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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re:) Chapter 11
)
) Case Nos. 98-12547 through
) 98-12570-ECF-CGC
)
BCE WEST, L.P., et al.,)
)
Debtors.) Jointly Administered
)
EID: 38-3196719) **JOINT PRETRIAL STATEMENT**
) **PERTAINING TO THE THIRD**
) **MOTION TO ASSUME REAL**
) **PROPERTY LEASES, AS AMENDED**
) **WITH RESPECT TO STORE NO. 987**
)
) **Date: July 20, 1999**
) **Time: 1:30 pm**
) **Place: Courtroom No. 6, Phoenix (CGC)**

BCE West, L.P., Boston Chicken, Inc., and Mayfair Partners, L.P. (“Mayfair”), debtors
and debtors in possession (collectively the “Debtors”) and Fairfax Plaza Company (“Fairfax”)
(collectively, the “Parties”) submit this Joint Pretrial Statement pertaining to the Debtors’ Third

1 Motion for Authority to Assume Non-Residential Real Property Leases, as Amended (the “Motion”)
2 with respect to Store No. 987 (the “Store”).

3 **I. JURISDICTION**

4 Pursuant to 28 U.S.C. §§ 1334 and 157, the Court has jurisdiction to hear the Debtors’
5 Motion and Fairfax’s objection to the Motion. Pursuant to 28 U.S.C. § 157(b)(2)(A), (M), and (O),
6 the Motion and Fairfax’s objection present a core proceeding. The relief requested by the Motion is
7 provided by 11 U.S.C. § 365(a).
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9 **II. AGREED FACTS REQUIRING NO PROOF**

10 The Parties stipulate to the following facts, which require no proof:

11 1. On October 5, 1998 (the “Petition Date”), the Debtors filed voluntary petitions for
12 relief under Chapter 11, Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”), in
13 the United States Bankruptcy Court for the District of Arizona (the “Court). The Debtors are
14 operating their businesses and managing their property as debtors in possession ” pursuant to
15 Bankruptcy Code §§ 1107(a) and 1108.
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17 2. Prior to the filing of these cases Mayfair was a party to a non-residential real
18 property lease dated May 10, 1995 with Fairfax pertaining to Store No. 987 located at 2988 Gallows
19 Road, Falls Church, Virginia (the “Lease”).
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21 3. During the course of these cases the Debtor Mayfair, through its authorized agent
22 Huntley Financial Group (“Huntley”), negotiated with Fairfax in an effort to reduce the rent
23 obligations under the Lease.
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1 4. On March 9, 1999, Huntley forwarded an Addendum to Lease Agreement (“Lease
2 Addendum”) to Fairfax for execution. The Lease Addendum contained modifications to the rent
3 provisions under the Lease resulting in rent reductions over a three-year period.

4 5. On or about March 15, 1999, Fairfax executed the Lease Addendum and returned it
5 to the Debtors, along with a letter from Fairfax requesting that the Lease Addendum be executed by
6 Mayfair and that a fully executed copy of the Lease Addendum be promptly returned to Fairfax.

7 6. On April 5, 1999, the Debtors filed the Motion and subsequently served it on Fairfax.
8 The assumption of the Lease with Fairfax, as amended by the Lease Addendum, was included in the
9 Motion.
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11 7. On April 12, 1999, Fairfax notified the Debtors that it was withdrawing and
12 canceling the Lease Addendum because it had not received an executed copy of the Lease
13 Addendum.
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15 8. On April 19, 1999, Debtors advised Fairfax that its withdrawal and cancellation of
16 the Lease Addendum was ineffective since the Lease Addendum had been signed by Mayfair, and
17 the Debtors intended to move forward with the Motion which was scheduled for hearing on April
18 27, 1999.

19 9. On April 20, 1999, Fairfax advised Debtors that it disagreed with Debtors’ position
20 and requested the Lease Addendum be returned and marked “void.”
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22 10. By letter dated April 21, 1999 (which Fairfax contends was postmarked April 30,
23 1999), the Debtors sent to Fairfax the fully executed Lease Addendum.
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1 **IV. FACTS DISPUTED BY THE PARTIES**

2 1. Debtors contend that Mayfair accepted the Lease Addendum by signing it on March
3 25, 1999, and by filing the Motion with the Court and serving it upon Fairfax.

4 2. Fairfax contends that Mayfair failed to (a) accept the March 15, 1999 offer of Fairfax
5 to modify the Lease, prior to its withdrawal by Fairfax, and (b) comply with Fairfax's request and
6 condition that the Lease Addendum be signed by Mayfair and promptly returned to Fairfax. Fairfax
7 contends that on April 12, 1999, Fairfax canceled and withdrew its offer of March 15, 1999 because
8 Mayfair had not yet accepted the offer by returning to Fairfax a fully executed copy of the Lease
9 Addendum.
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11 **V. LEGAL OR FACTUAL ISSUE TO BE DECIDED:**

12 **Whether the Parties made a binding contract to modify the terms of the Lease.**

13 **Debtors contend** that Huntley's transmission of the Lease Addendum to Fairfax constituted
14 a written offer, that Fairfax's execution and return of the Lease Addendum constituted an acceptance
15 of that offer, and that therefore the Lease Addendum constitutes a binding contract. Alternatively,
16 Debtors contend that if Fairfax's execution and return of the Lease Addendum is deemed to be an
17 offer, it was timely accepted by Debtors' execution of the Addendum on March 25, and by Debtor's
18 filing of the Motion on April 5, which acceptance was communicated to Fairfax at least by service
19 of the Motion on Fairfax, and that Fairfax's purported withdrawal of the offer therefore came too
20 late after the contract had already been formed. Debtors contend their acceptance of the Lease
21 Addendum was timely in accordance with Fairfax's March 15, 1999, request to complete the
22 transaction by June 15, 1999.
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Fairfax contends that its execution and delivery of the Lease Addendum on March 15, 1999 was an offer to modify the Lease and that its offer was timely and validly withdrawn prior to Mayfair's acceptance of the offer. Furthermore, Mayfair did not promptly return the fully-executed Lease Addendum as Fairfax had required when it transmitted the Lease Addendum (signed only by Fairfax) to Mayfair on March 15, 1999. Under applicable Virginia law, any modification to the Lease was required to be in writing and signed by the parties to be charged. No such writing exists, and therefore the proposed Lease Addendum is not binding upon Fairfax. Only the Lease, in its form as of the Petition Date, may be assumed by the Debtors.

VI. WITNESSES

Debtors' witnesses:

1. J. Randal Miller, to testify as to the terms and negotiations of the Lease Addendum, and as to why the Debtors believe the assumption of the Lease, as amended by the Lease Addendum, is in the best interests of the estate.
2. R. Bacas, by deposition
3. Any witness listed or called by Fairfax.

Fairfax's witnesses:

1. R. Bacas, by deposition
2. J. Randal Miller
3. William J. Scarpino
4. Any witness listed or called by Debtors

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VII. EXHIBITS

Stipulated Exhibits: The Parties stipulate the following exhibits may be admitted into evidence without objection:

1. Lease, as modified prior to the Petition Date
2. Unsigned Lease Addendum
3. October 9, 1998 Letter from Debtors to Fairfax
4. November 25, 1998 Letter from Huntley to Fairfax
5. March 9, 1999, Letter from B. Scarpino of Huntley to R. Bacas with Fairfax forwarding the Lease Addendum for execution.
6. March 15, 1999, Letter from R. Bacas to M. Roberts with BCI forwarding the executed Lease Addendum.
7. March 16, 1999, Letter from R. Bacas to M. Roberts.
8. Addendum to Lease Agreement executed by Fairfax.
9. Addendum to Lease Agreement executed by Fairfax and by Mayfair.
10. April 5, 1999 Debtors' Third Motion for Authority to Assume Non-Residential Real Property Leases, as Amended (the "Motion")
11. April 12, 1999, Letter from R. Bacas to M. Roberts notifying BCI of Fairfax's intention to withdraw and cancel the Lease Addendum.
12. April 19, 1999, Letter from R. Miller to R. Bacas.
13. April 20, 1999, Letter from R. Bacas to R. Miller.
14. April 21, 1999, Letter from R. Miller to R. Bacas.

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2 15. April 21, 1999, Letter from B. Mason for Debtors to R. Bacas, postmarked on April 30,
3 1999, containing the Lease Addendum executed by Mayfair.

4 Dated this 15th day of July 1999.

5 DEBTORS AND DEBTORS IN POSSESSION

6
7 By: /s/ Randolph J. Haines
8 One of their Attorneys

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10 FELD, L.L.P.
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